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No. 22

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

WEYERHAEUSER COMPANY

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

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Act of Feb. 11, 1805, ch. 14, §§ 1 & 2, 2 Stat. 313 (§ 2 codified in 43 U.S.C. § 752) 16

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General Land Office, Manual for the Survey of the Public Lands of the United States (1947 ed.), §§ 373, 374, 378. . . . . 13, 14

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. _____

WEYERHAEUSER COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner Weyerhaeuser Company, a corporation, respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals of the Ninth Circuit, entered in Cause No. 21275 on February 28, 1968.

OPINIONS BELOW

The Court of Appeals opinion is reported at 392 F.2d 448. The opinion of the United States District Court for the District of Oregon in Civil Cause No.

64-56, Weyerhaeuser Company v. United States of America, is not reported.

Copies of the Court of Appeals Opinion dated December 26, 1967, as amended by its Order Amending Opinion and Order Denying Petition for Rehearing, and a retyped copy of the District Court's Opinion (R84-96), are set forth in Appendix A.

JURISDICTION

After the filing of a Petition for Rehearing, the opinion was amended by the aforesaid Order filed February 28, 1968.

By order of this honorable Court signed by Mr. Justice Douglas and dated May 14, 1968, the time for filing this petition was extended to and including June 24, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The case involves a needle-shaped tract of land high in the mountains of Western Oregon, but the basic question involves title and boundary law affecting urban as well as rural, and developed as well as undeveloped, lands in vast areas of the United States.

The basic question is whether gores or strips of government ownership exist when it is discovered that the monuments of two original government surveyors, intended to be placed along a common boundary separating the respective townships surveyed by each surveyor, are not in fact located along the same line.

To illustrate, assume that original government surveyor "x" establishes (in 1855) the north boundary of a township by placing his corner monuments thus:

x x x x x x x

and that original government surveyor "o"

is instructed (in 1896) to establish the south boundary of the next township to the north by placing his corner monuments on a straight line between the monuments of surveyor "x" thus:

o x o x o x o x o x o x o x

but in fact it is discovered (in 1961), long after patents have issued in reliance on the survey records, that the actual locations of the monuments are thus:

o x o x o x o x o x o x o x

The basic facts of this case are as set forth in the preceding illustration.

STATUTES INVOLVED

There are only three statutes involved:

1. Act of May 18, 1796, ch. 29, § 2, 1 Stat. 465 (43 U.S.C. § 751, pt.)

2. Act of May 10, 1800, ch. 55, § 3, 2 Stat. 73 (43 U.S.C. § 751, pt.)

3. Act of February 11, 1805, ch. 14, §§ 1 & 2, 2 Stat. 313 (§ 2 is codified

in 43 U.S.C. § 752).

These are set forth in Appendix B-1, B-2 and B-3.

STATEMENT OF THE CASE

The basic facts are as set forth in the foregoing statement of the question presented. However, it should be added that the monuments of surveyor "x" were set to mark a Standard Parallel as well as the north boundary of a township. Also, it should be added that the record of the work of surveyor "o" states that he was unable to find four consecutive monuments (at half-mile intervals) set by surveyor "x" 41 years earlier. Names, dates and locations are as set forth in the opinion of the Court of Appeals, and will not be repeated here.

In the trial court, an action for conversion of logs, the ownership of which depends on ownership of the lands here under consideration, was instituted by

petitioner against the United States. Jurisdiction was and is based upon U.S.C. §§ 1346 and 2674.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

The government contends that the actual locations of the monuments control the areas surveyed by each respective surveyor, and that any area in between is unsurveyed public domain belonging to the United States.

This petitioner contends that the monuments of the second surveyor are closing corners, controlling as to sideline or eastern and western boundaries but in turn controlled by the township line established by the first surveyor insofar as northerly or southerly location is concerned.

The opinion of the Court of Appeals reversed the trial court and adopted the government's position. It does not mention the scope, if any, left for the operation of the closing corner rule. Thus, it joins the myriads of cases that have stated and applied the actual location rule, but for the first time applies the rule to recognize a claim of government ownership due to misalignment of double monuments along a Standard Parallel.

The question presented goes to the very fabric of the rectangular system of surveys. This system in turn is the heart of the land tenure system in the "Western Territories" of the thirteen original colonies, and in substantially all areas subsequently added to the United States.

The opinion of the Court of Appeals creates uncertainty as to the boundaries of substantially all tracts of land on

the exterior of any original government survey,

(i) the record of which at the time of issuance of patents showed that they coincided with the line of another original government survey, and

(ii) where corner monuments were set by each surveyor along a purported common township line.

Ordinarily, this situation occurs when a surveyor is completing a line through a township, attempting to set his final section corner monument on a point of intersection between his line and the exterior boundary of the previously surveyed township. Seldom will the second surveyor's line intersect the township boundary precisely at a monument set by the first surveyor. Thus a second set of monuments are set on what the second surveyor determines to be, but seldom is, a perfect straight line between the nearest identifiable monuments of the first surveyor.

Thus, under the rectangular system of survey, double corners will exist along most township boundaries. There are 24 miles of such boundaries for every 36 square miles of area in a majority of the 2,977,128 square miles of land in the United States. Up to two million miles of boundary lines could have double corners, and could be rendered uncertain by the opinion below.

Double corners also occur along Standard Parallels, where the rectangular system calls for initiating lines at right angles to the Standard Parallel from points offset laterally from the monuments already marking the Standard Parallel. This permits the retention of one-mile sectional subdivisions of townships despite the convergence of meridians due to curvature of the earth.

The instant case involves double corners of the latter type, the second set

being utilized as points from which to initiate lines extending north and ending with closing corners of the conventional type at the next township line to the north. There are, of course, only about 100,000 miles of Standard Parallels, as compared to up to 2 million miles of township boundaries. Nevertheless, this issue is still worthy of Supreme Court review even if the opinion below is interpreted as applicable only to double corners on Standard Parallels.

If the actual location of monuments rule is applied to double corners along a purported single line, uncertainties as to boundaries are bound to be created. This is because no two surveyors seeking to establish points along the same straight line can possibly establish their points precisely upon a straight line or precisely in line with one another. The magnitude of the error or misalignment

will depend upon many factors, including the skills and attitudes of the individual surveyors, accuracy of their instruments, time period between the two surveys, and the terrain. However, there will always be some misalignment, easily demonstrated by any subsequent and more accurate re-survey.

As noted above, this case involves an accidental gap created by misalignment of initiating corners on a Standard Parallel. The sole issue should have been whether these corners are to be treated the same as conventional closing corners. However, the government's skillful advocacy of the actual location of monuments rule has resulted in an opinion in the Court of Appeals suggesting that the actual location rule has no exception. This cannot be, else utter chaos will reign in land title law and survey practices that have been settled for almost two centuries.

The opinion upsets a beautifully logical system that has resulted in as much repose and certainty as the subject will permit.

There are well-recognized exceptions to the rule that actual locations of monuments are absolutely controlling. One such exception is in the case of monuments of meander corners, where the rule has been well settled that the natural water boundary controls over the actual location of the meander corner monument.

A second obvious exception is in the case of overlapping monuments, where the actual location of one of the two monuments or sets of monuments must be disregarded.

The third exception, well-recognized in both gap and overlap situations until the instant opinion was filed, was the closing corner rule applicable to lines closing upon a previously surveyed township exterior boundary. In this situation, the actual location of the monuments

of the second surveyor control the direction of the interior boundaries of the sections and legal subdivisions thereof, while the length of the interior boundaries and the placement of the township exterior boundary is controlled by the line established in the prior survey.

A fourth exception extends the closing corner rule to initial survey corners on a previously surveyed Standard Parallel. (Clark, A Treatise on the Law of Surveying and Boundaries (3d ed.) §§ 332, 336, 343; General Land Office, Manual of Instructions for the Survey of the Public Lands of the United States, (1947 ed.) §§ 373, 374 & 378.) Particular reliance is placed upon the following passages from these texts:

From Clark, op. cit.:

> "All standard township, section, quarter-section, meander corners when terminating the survey of a standard parallel, and closing corners where they were originally established by measure-

ment along the standard line as points from which to start a survey are original standard corners." § 336 at 366.

"Corners first set in the running of a correction line will be treated as original standard corners, but those set afterwards at the intersection of a meridional line will be regarded as closing corners." § 343 at 371.

From the Manual, op. cit.:

"Corners on base lines are to be regarded the same as those on standard parallels. In the older practice the term 'correction line' was used for what has later been called the standard parallel. The corners first set in the running of a correction line will be treated as original standard corners; those that were set afterwards at the intersection of a meridional line will be regarded as closing corners." § 374, at 297.

"A closing corner not actually located on the line that was closed upon will determine the direction of the closing line, but not its legal terminus; the correct position is at the true point of intersection of the two lines." § 378, at 299.

Whether this exception exists, and is applicable to this case, is the specific question which petitioner asks this Court to review and as to which petitioner desires to submit a brief and argument on the merits.

As noted before, the basic question in this case is simple. It will be as easy for this honorable Court to close Pandora's box as it was for the Court of Appeals to open it. All that the case requires, after consideration on the merits, is a ruling that the closing corner rule exists and is applicable to corner monuments used to initiate surveys from a previously established Standard Parallel.

Even if this Court will not subscribe to the foregoing, it is earnestly and most respectfully submitted that the opinion of the Court of Appeals should be reviewed in order to clarify the rules for the determination of ownership where double corners were set in the original surveys.

Land surveyors and other practical men in hard hats, who deal daily with boundaries where double corners exist,

need clearer guidelines than those provided by the Court of Appeals.

CONCLUSION

This is a case of first impression in courts whose opinions are reported.

There are scores of reported opinions, including several from this honorable Court, recognizing the actual location of monuments rule as set forth in 2 Stat. 313 (Appendix B-3). None are determinative of the important federal question here presented, and none examine the above cited statute in the light of the other more basic statutes pertaining to the rectangular system of survey (1 Stat. 465; 2 Stat. 73 (Appendix B-1 and B-2)). More importantly, none were cited as determinative of this case in either of the courts below.

The case was thoroughly briefed in the District Court and the Court of

Appeals, with exhaustive statutory, judicial, administrative and text authorities cited and quoted, all as set forth in the certified transcript on file in this Court. In compliance with the rules governing this petition, these collateral authorities have not been cited or discussed herein.

Respectfully submitted,

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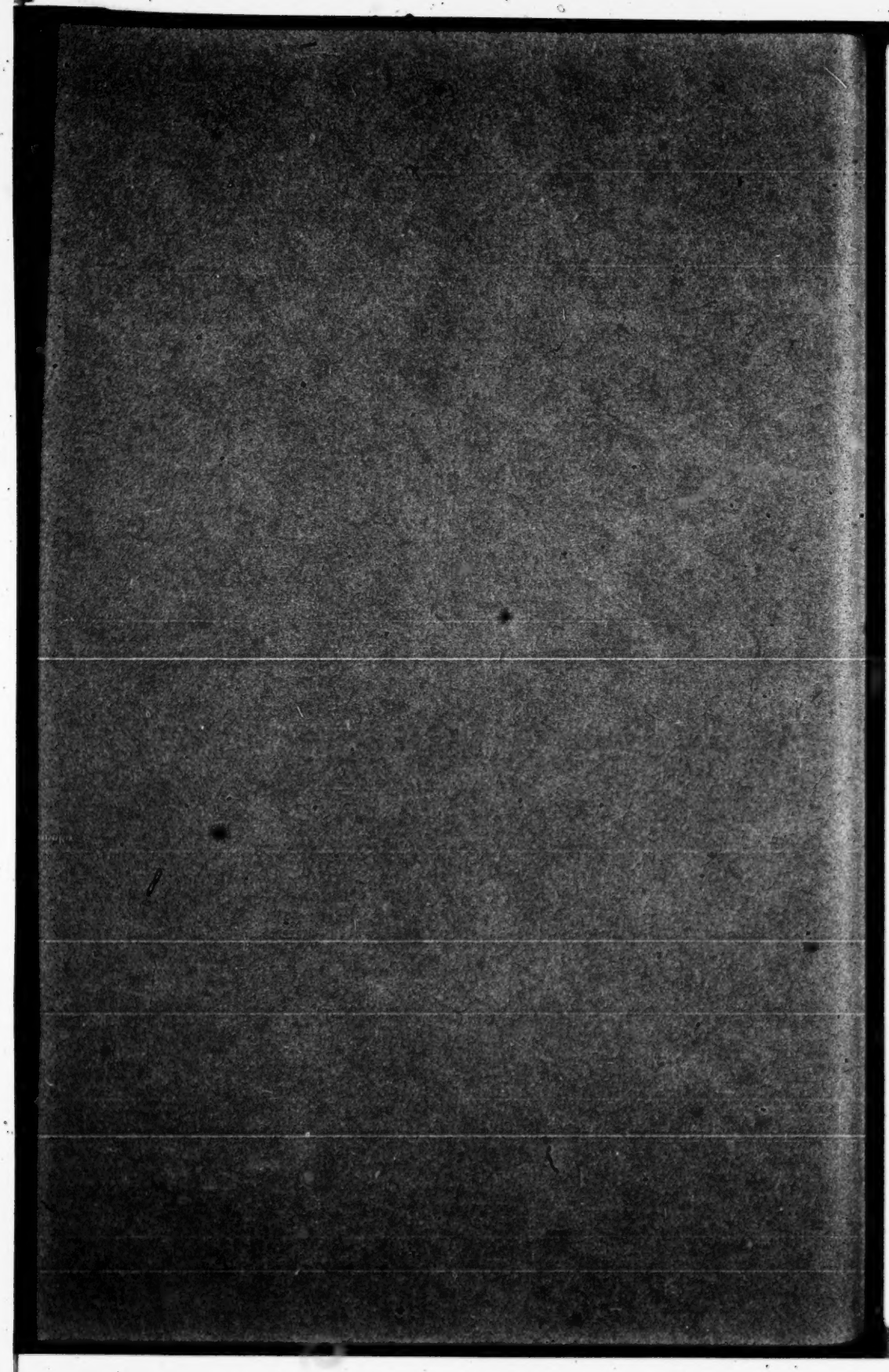


UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant,* vs. WEYERHAEUSER COMPANY, a corporation, *Appellee.*	No. 21,275

[December 26, 1967]

Amended Opinion

On Appeal from the United States District Court
for the District of Oregon

Before: MADDEN, Judge of the United States Court of Claims, and HAMLEY and MERRILL, Circuit Judges.

MADDEN, Judge:

The appellee corporation, hereinafter called Weyerhaeuser, sued the United States for damages for the conversion of logs cut and removed from land claimed by Weyerhaeuser to be its land. The only issue in the case is the ownership of the land from which the logs were taken. The district court decided that the land belonged to Weyerhaeuser, and awarded it a money judgment against the United States. The case is here on the appeal of the United States from that judgment.

The land here in question, consisting of 45.95 acres, was, in 1855, a part of the public lands of the United States, as was all of the land in the immediate area. A surveyor, Hathorn, was employed by the United States to survey a line called by the Government the Sixth Standard Parallel South, through Ranges 8, 9 and 10 West. The sixth parallel line was, of course, an east and west line. Under Hathorn's contract he was required to establish the exterior lines of the townships lying along and immediately south

of the sixth parallel. A township, in a government survey, is a square tract six miles on each side, thus containing thirty-six square miles of land. One of the townships which Hathorn was under a duty to survey was Township 28 South, Range 8 West. His contract also required him to subdivide the townships surveyed by him into sections, each section being a square, each side of which is one mile long, each township thus containing 36 sections, and each section containing one square mile, 640 acres of land. At the point on the sixth parallel which coincided with the northeast corner of Township 28, Hathorn placed a monument which would permanently mark that corner of the township, then, as he worked west along the parallel, he placed a monument a mile west of the beginning point, and so at each successive mile for the six miles of Township 28, then turning south at right angles to the parallel, placed a monument each mile along the west side of the township, then turned east for six miles and then north for six miles to the beginning point on the sixth parallel, placing monuments each mile along these exterior lines. Then he surveyed the lines in the interior of the township, running from each mile monument on the sixth parallel to the corresponding mile monument on the south boundary of the township. Then he surveyed the east-west lines connecting the monuments on the east and west sides of the township. The purpose and effect of the surveying and marking of these exterior and interior lines of the township was to checker-board the township into thirty-six sections, and the consequent number of half sections and quarter sections.

In 1896, at which time the land on both sides of the sixth parallel was still public land of the United States, another surveyor, Heydon, was employed by the Government to survey Township 27, which lay north of the sixth parallel, and the east and west boundaries of which would be extensions of the lines forming the east and west boundaries of Township 28 which, as we have seen, lay south of the sixth parallel. A part of Heydon's directions was to retrace the sixth parallel as established by Hathorn, which retraced line would be a common boundary between Township 28, surveyed in 1855, and Township 27, which Heydon was to survey in 1896.

Heydon retraced the Hathorn location of the sixth parallel as best he could. He found Hathorn's monument marking the point on the sixth parallel which was the north-east corner of Township

28. It should be noted that the 36 sections of a township are, in government surveys, numbered from the northeast corner of the township westward along the top tier of sections, then eastward along the second tier and so on through the 36 sections. Not counting the monument on the sixth parallel, from which monument we proceed westward, Heydon found Hathorn's first and second mile monuments. He could not find the third or fourth mile monuments. He did find a Hathorn half mile monument half way between where the fourth should have been, and the fifth, which he found. He found the sixth, which was the northwest corner of Township 28. Thus for two and one-half miles of the six miles on the sixth parallel survey by Hathorn, Heydon had no monuments. In retracing the Hathorn location of the sixth parallel for this two and one-half mile distance, Heydon had only a point of beginning, at the second mile monument, and a place two and one-half miles west, to get back on the Hathorn line.

Heydon placed mile monuments at locations which his survey convinced him, were on the sixth parallel, at points one and two miles west of the Hathorn two-mile monument which he had found. Heydon proceeded to complete his survey of Township 27, subdividing it as Hathorn had done with Township 28 in 1855. Heydon's survey of Township 27 was officially accepted and approved in 1897. On the official plat of the township was a statement that it was amended and was strictly conformable to Heydon's field notes which had been filed. Those field notes state that "none of the original corners set by Hathorn were found . . . for two and one-half miles" along the south boundary of Township 27. The south boundary was shown on the plat of Heydon's survey as being the sixth parallel.

We have described the situation as it existed in 1896, at which time all the lands in Townships 28 and 27 were still public lands of the United States. At various times between 1903 and 1948 the United States conveyed by patents to persons who later conveyed to Weyerhaeuser sections 31, 32, 33, 34 and 35 of Township 27. These sections were in the southern tier of sections in Township 27.

At some time not long before the year 1961, excavations during a road-building project uncovered the Hathorn monuments which Heydon had been unable to find in 1896. The Heydon monuments

were still there. The line set by the Heydon monuments, placed by him to replace the two Hathorn monuments which he could not find, lay north of the line set by the later discovered Hathorn monuments. Thus an area of land, the area here in question and shown by the map attached hereto as Appendix 1,* lay between the Hathorn line and the Heydon line. This area is some 300 feet wide at its widest point and contains 45.95 acres. The logs taken by the United States from this area are the subject of this lawsuit, and the ownership of the area is the decisive question.

After the discovery of the two sets of monuments, the Government in 1961 caused a "dependent resurvey" to be made. That resurvey disclosed the hiatus, hereinbefore described, left by the variations between the Hathorn and Heydon surveys. The area of the hiatus was surveyed and subdivided and was designated at Township 27½. This township contains 45.95 acres, instead of the usual 36 square miles, of land.

Before the Hathorn survey in 1855, the sixth parallel was an abstraction, and remained so until it was located by human means on the surface of the earth. The rugged nature of the earth's surface in the area made it unthinkable that any two surveyors, working independently of each other, would locate it in the same place. Hathorn made his survey, monumented his line, and the sixth parallel ceased to be an abstraction. When some of his monuments ceased to be the subject of human consciousness, the sixth parallel, for the distance between his remaining discoverable monuments, again became an abstraction, and remained so until another surveyor, Heydon, in 1896 located the sixth parallel on the ground. Neither party to this litigation attempts to tell us where the sixth parallel really is, in the disputed area. Neither claims that Hathorn was a more competent surveyor than Heydon, or vice versa. Both parties recognize that one or the other of the lines set by these two surveyors is the decisive line in fixing the south boundary of Township 27. They differ as to which of the two lines is the one properly applicable.

Weyerhaeuser urges that the Hathorn line is the applicable one because it was drawn first and thus permanently located the boundary. That would mean that the true line was unknown and

*This map has not been reproduced as a part of this printed opinion, but it will be published in the Federal Reporter.

apparently unknowable for decades, perhaps for most of a century. Yet the owner of the land, the United States, could do nothing except hold the land, or dispose of it in bulk, because neither it nor a prospective purchaser could know what was being bought and sold on either side of the unknown sixth parallel. We can think of no possible reason why a landowner, having had his land surveyed and subdivided, may not, either because monuments have disappeared or because he has changed his mind as to the wisdom of his subdivision, have his land resurveyed. If, as in the case of the United States, the area in question is large and in rugged territory and the monuments of the earlier survey have disappeared, the owner knows that the resurvey will not place the lines exactly where they were in the earlier survey. He causes the resurvey to be made and thereafter sells parts of his land, describing those parts with reference to the later survey. If the prospective purchaser wants to go to the trouble or expense of assuring himself as to where the boundaries are by searching for the monuments marking the boundaries, the only monuments to be found are those of the survey on the basis of which the sale is being made.

The first and only survey of Township 27 in existence at the time Weyerhaeuser's predecessors in title received their patents to land in Township 27 was the 1896 Heydon survey, which survey had been officially accepted and approved by the Secretary of the Interior and upon the basis of which the official plat of the township had been made. That survey contained a monumented line marking the southern boundary of the township, which line also marked the southern boundary of each of the sections of the southern tier in the township. The land included in the patents could not have been ascertained, for use or occupation by the patentees, except by reference to that survey and plat. If the areas included in the patents were not so defined and limited, the southern boundaries of the sections were at large. If those boundaries were open to litigation upon claims that the surveyor was incompetent, or that his instruments were inaccurate, or that the Secretary should not have accepted and approved his survey, innumerable attacks upon titles could be made. The wisdom of centuries of land law to the effect that lines marked on the ground by monuments stand highest in the determination of the true boundaries of conveyed land, ranking above statements of directions, distances, or area, would be discarded.

The patents issued by the Government after the Heydon survey, which was the only survey of Township 27, did not purport to convey any land which was not included in that survey. Weyerhaeuser here is claiming that the patents to its predecessors in title granted lands which were outside the official survey of Township 27. In Haydel v. Defresne, 58 U.S. (17 How.) 23, 30 (1854), the Court said:

> [G]reat confusion and litigation would ensue if the judicial tribunals, state and federal, were permitted to interfere and overthrow the public surveys on no other ground than an opinion that they could have the work in the field better done, and divisions more equitably made than the department of public lands could do.

The instant case is a textbook example of a departure from that admonition of the Supreme Court. The district court said in its conclusions:

> Heydon could not find Hathorn's monuments and corners forming the south boundary of the land area in dispute (however, they were there, and *were* found in 1961), and, faced with this loss of corners and monuments, instead of proceeding "due west" in extension of the 6th Standard Parallel line he had been retracing, he varied to the north from infinity to a maximum of approximately 150 feet, over the distance of three miles. Heydon deviated from his instructions, and his corners and monuments cannot stand as the south boundaries of Secs. 32, 33, 34, and 35 in Tp. 27.

In this conclusion the district court was in error.

We also think the court was in error in the following statement in its conclusions:

> There is and can be but *one* 6th Standard parallel South, dividing Tp. 27 and Tp. 28 and forming the south boundaries of Secs. 32, 33, 34 and 35 in Tp. 27, and that is the 6th Standard Parallel South surveyed and established on the ground by Hathorn in 1855, as he was commissioned to do. (Emphasis in original.)

As we have explained earlier herein, we think that it cannot be said that there is but *one* sixth parallel until we have a combination of the ideal surveyor, using ideal instruments in an ideal terrain. Until that combination is available, land titles will be dependent upon the deficiencies and uncertainties which afflict the world as it is.

There is no problem in this case of impairment of vested rights. When the Government in 1896 employed Heydon to survey Township 27, no one except the Government had any rights in the area, all of which was owned by the Government. There being no rights in other persons in 1896, no rights were impaired by what the Government did with or upon its own land. There is no claim in this case of any breach of covenant made by the Government in its conveyances of 1903 and thereafter.

The district court said that it disregarded the 1961 cadastral survey on the basis of which the Government created the new Township 27½. We think those events are irrelevant to the issues in this case. The Government could not, of course, have taken any land from Weyerhaeuser for inclusion in its newly created township. Our only question is whether Weyerhaeuser owned this land which was south of the Heydon surveyed line. If, as we think, it did not, we have no occasion to decide who did own such land and what it might do with it.

The Government raises the question whether Weyerhaeuser should have exhausted its administrative remedies in the Department of the Interior in order to be entitled to bring this suit. We have not considered that question thoroughly because we think that in the circumstances it would be uneconomical practice to send the case all the way back to the Department of the Interior for further administrative proceedings.

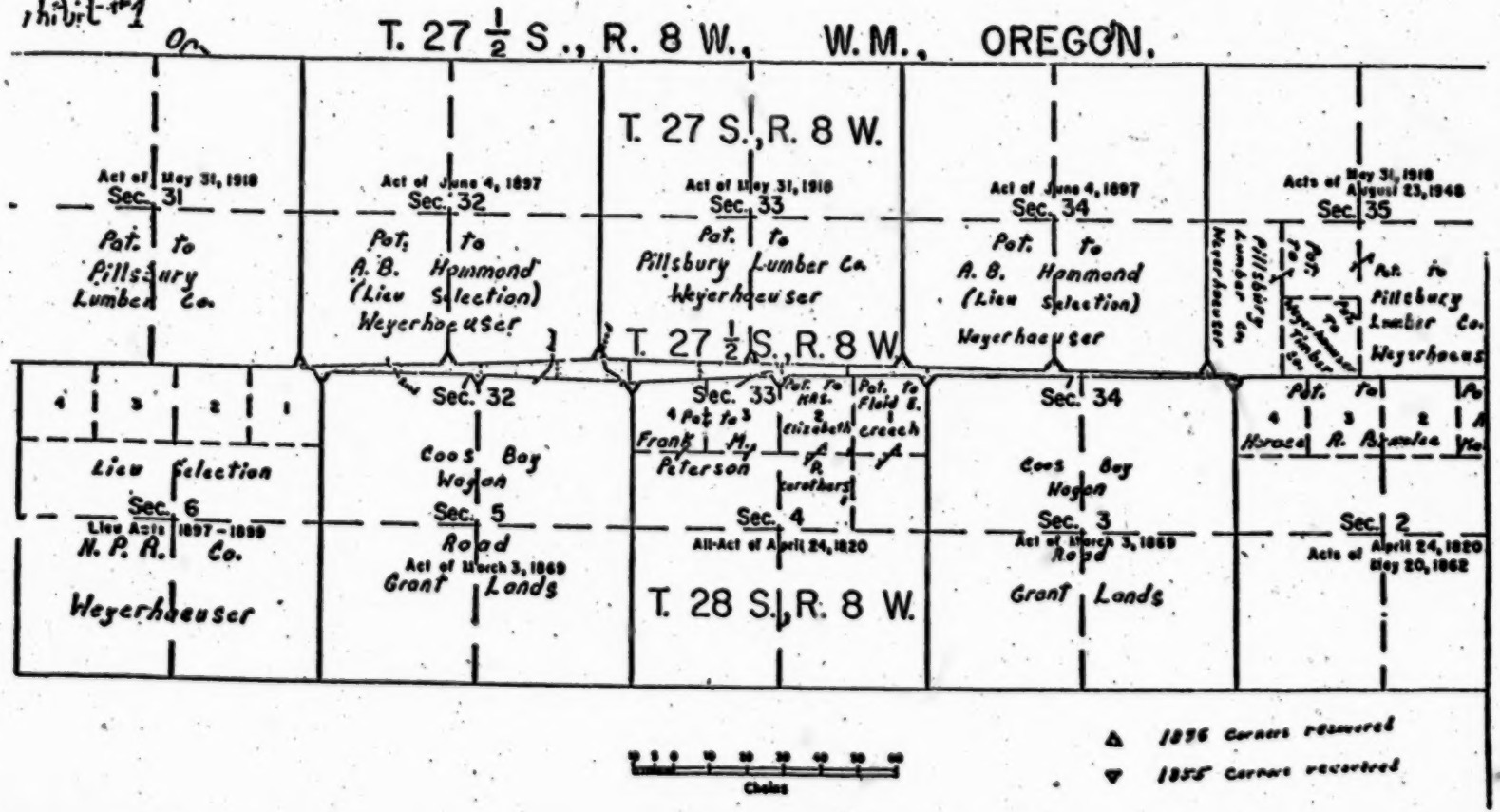
We have this case upon what is, in effect, an agreed statement of facts. We perceive in it only one decisive issue, which is whether or not the Government's patents to Weyerhaeuser's predecessors in title conveyed to them the land here in question, which lay outside the boundaries of the Heydon survey. We answer that question in the negative, and therefore reverse the judgment of the district court, with a direction to dismiss the complaint.

MERRILL, Circuit Judge, Concurring:

I concur in the result reached by the majority. In my view Township 27 and Township 28 are right where the Government put them, whether that is precisely where they were intended to be put or not. Official approval and platting of the surveys established the township boundaries in accordance with their respective monuments. Consequently the north boundary of Township 28 is where Hathorn put it and the south boundary of Township 27 is where Heydon put it. Heydon did not affect the Township 28 line since he did not purport to re-establish it and was not concerned with that township. His assumption that he was on a common boundary cannot affect what he actually did and what the Government officially adopted. The resulting error in placement was subject to official correction and to re-establishment of a common boundary, but such correction and the decision to correct are beyond the judicial function. The result is that the area designated as Township 27½ is still unpatented public land.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 3-21-68—255

Exhibit #1


T. 27 1/2 S., R. 8 W., W.M., OREGON.
T. 27 S., R. 8 W.
T. 27 1/2 S., R. 8 W.
T. 28 S., R. 8 W.
Act of May 31, 1918
Sec. 31
Pat. to Pillsbury Lumber Co.
Act of June 4, 1897
Sec. 32
Pat. to A. B. Hammond (Lieu Selection) Weyerhaeuser
Act of May 31, 1918
Sec. 33
Pat. to Pillsbury Lumber Co. Weyerhaeuser
Act of June 4, 1897
Sec. 34
Pat. to A. B. Hammond (Lieu Selection) Weyerhaeuser
Acts of May 31, 1918 August 23, 1948
Sec. 35
Pat. to Pillsbury Lumber Co. Weyerhaeuser
Lieu Selection
Sec. 6
Lieu Acts 1897-1899
N. P. R. Co.
Weyerhaeuser
Sec. 5
Coos Bay Wagon Road
Act of March 3, 1869
Grant Lands
Sec. 4
All-Act of April 24, 1820
Sec. 3
Coos Bay Wagon Road
Act of March 3, 1869
Grant Lands
Sec. 2
Acts of April 24, 1820 May 20, 1862
Chains
1896 Corners recovered
1855 Corners recovered

APPENDIX

Judgment

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs., No. 21275

WEYERHAEUSER COMPANY,
a corporation,
Appellee.

APPEAL from the United States District Court for the _____ District of Oregon

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the ____ District of Oregon and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the _____ judgment of the said District Court in this Cause be, and hereby is reversed with a direction to dismiss the complaint.

Filed and entered Dec 26, 1967

APPENDIX A

U.S. DISTRICT COURT
DISTRICT OF OREGON
FILED
APR 8 1966
DONAL D. SULLIVAN,
Clerk
By s/H. Jorgensen,
Deputy

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

WEYERHAEUSER COMPANY, a corporation, Plaintiff,	)	Civil No. 64-56
vs.	)	O P I N I O N
UNITED STATES OF AMERICA, Defendant.	)	

EAST, District Judge.

STATEMENT OF CASE

In these Title 28 U.S.C.A. § 1346 proceedings, the plaintiff Weyerhaeuser Company (Company) under its original complaint claims that the defendant United States of America (Government) wrongfully removed and converted to its own use some 120,000 board feet of logs, obtained from standing trees and timber wrongfully cut on real property owned by Company, of the value of $5,790.35.

The parties have subscribed to and filed a pretrial order in which all

material facts have been agreed to and which leaves no issue of fact for determination by the court. The court has approved the pretrial order and received into evidence the documents referred to as exhibits numbered 1 through 14 in the pretrial order.

The sole issues before the court are those of law, based upon the pretrial order agreed facts, the documentary evidence, and counsels' stipulation as to Company's chain of titles. The resolve of these issues of law will determine whether Company is the owner of the real property from which the logs were obtained and removed by Government, as contended by Company, or the real property involved is public domain, as contended by Government.

CONTENTIONS OF THE PARTIES

Company contends it is the owner of the real property, as successor to all the right, title and interest of the original patentees, by reason of

(a) proper construction of the descriptions of the real properties granted in the original patents under surveying law governing the surveying and laying out of the 6th Standard (Established) Parallel South, being the common boundary of Townships 27 and 28 south, Range 8 west of the Willamette Meridian, Douglas County, Oregon, by the Hathorn Survey of 1855; and

(b) estoppel of the Government from contesting Company's title to the real property in dispute.

Government contends that the real

property in dispute is public domain, as found and established by a cadastral survey ordered by the Acting State Director, Bureau of Land Management (Secretary of the Interior), on September 18, 1961, revealing a hiatus (variation in the surveys of Hathorn in 1855 and Hayden in 1896, of the 6th Standard Parallel South) along the boundaries of Tps. 27 and 28. Attached hereto as Appendix 1 is pretrial order Exhibit 1, delineating Government's claimed variation in the two surveys. The upright pyramids, "designated as 1896 corners recovered," are the monuments and corners placed by Hayden. The inverted pyramids, "designated as 1855 corners recovered," are the monuments and corners placed by Hathorn in the course of his survey, establishing on the ground the 6th Standard Parallel South. It is the area between these two lines, being approximately three miles in length and approximately 308 feet in width at the maximum, which Company claims to own and which Government claims to be public domain by reason of the cadastral-surveyed hiatus of land area between the boundaries of the adjoining Townships 27 and 28 south.

MOTIONS FOR SUMMARY JUDGMENT

Based upon the agreed facts in the pretrial order and the documentary evidence, both Company and Government have moved, pursuant to Rules 12 and 56 F.R.Civ.P, for a judgment in their respective favors, on the grounds that there is no genuine issue as to any material fact and that the respective parties are entitled to a judgment in their favor as a matter of law.

AGREED FACTS AND DOCUMENTARY EVIDENCE

The parties, of course, are well-versed as to the pretrial order agreed facts and documentary evidence, but, for the benefit of the reader, I will recite such of those agreed facts and parts of the documentary evidence as seem to be pertinent to our ultimate resolve.

HATHORN SURVEY:

By agreement with the Government dated April 12, 1855, one Dennis Hathorn agreed to survey, mark, and establish on the ground the 6th Standard Parallel South through Ranges 8, 9, and 10 west, and also the exterior and subdivisional lines of Tp. 28 south, Range 8 west. Pursuant to such agreement, Dennis Hathorn did survey and establish on the ground the 6th Standard Parallel South through Range 8 west, as set forth in his field notes submitted in connection with the survey. As indicated therein, Hathorn established monuments every half mile along an assertedly due-west line running east and west through Range 8 west to establish the location of the 6th Standard Parallel South. In addition, Hathorn surveyed the subdivisions of a portion of Tp. 28 lying south of the said 6th Standard Parallel South deemed to be fit for settlement, as required in his contract. Thereafter, a plat of Hathorn's survey was approved and filed by the Surveyor General of Oregon in his office in Salem, Oregon, on July 7, 1856, which plat is evidenced by pretrial Exhibit 6.

HAYDEN SURVEY:

By agreement with the Government dated May 21, 1896, William P. Hayden agreed to survey, mark, and establish all of the township and section lines necessary to complete three townships south in Ranges 7 and 8 west. This agreement was accompanied by special and supplemental instructions of the Surveyor General of Oregon, dated June 15, 1896. Of special interest to us, the special instructions provided, inter alia, the following:

> "Before commencing the survey of W.Bdy. of 27 S., 8 W., you will begin at the standard ... S.W. Cor. of Tp. 27 S. R7W, and run W., retracing the 6th established parallel south, estab. cor ... for Tp. 28 S. R.8W. ..."

The Surveying contract with Hayden is designated as Contract No. 656, and is evidenced by pretrial Exhibit 7.

Of particular and controlling interest to us is the plat, pretrial Exhibit 7-A, being a part of the special instructions. The areas "to be surveyed" are indicated by heavy and light broken lines (_____ _____ _____). The areas thus delineated are shown to be the west line and the sectional lines of Tp. 27. The areas theretofore surveyed and referred to as "old surveys," are indicated by heavy and light solid lines (_____). The north, east, and south ("6th Standard Parallel South") boundaries of Tp. 27 are delineated with a heavy solid line, and with reference to the "6th Standard Parallel South" line there appears the following: "Retrace and set Corners for Tp. No.

27 S, R No. 8 W." The 6th Standard Parallel South line so delineated is depicted as the common boundary between Tp. 28 S, R8W. and the to-be surveyed Tp. 27. According to Hayden's field notes, he proceeded to retrace the 6th Standard Parallel South and set corners to Tp. 27. He found the north section corner common to Secs. 2 and 3, Tp. 28, as established by Hathorn (see Appendix 1), but none of the original corners set by Hathorn were found for the next two and one-half miles "at which point Hayden, still proceeding west in the retracement of the 6th Standard Parallel South, encountered the posts set by Hathorn marking the 6th Standard Parallel South and the north quarter corner of Sec. 5, Tp. 28, and thereafter found the north section corner common to Secs. 5 and 6 ... to Tp. 28, ..." (see Appendix 1).

Thereafter, a plat was prepared from Hayden's field notes, as corrected, and filed in the Surveyor General of Oregon's office at Portland, Oregon, on September 10, 1897, which plat is evidenced by pretrial order Exhibit 11. I repeat, this plat of Hayden's subdivisional survey of Tp. 27 shows the 6th Standard Parallel South as surveyed, marked, and established by Hathorn, as the south boundary of Tp. 27, and particularly Secs. 32, 33, 34, and 35 west.

1961 CADASTRAL SURVEY:

In 1961, and in the course of Government's survey work for a proposed timber-access road, which access road, as ultimately established, crosses the disputed land area at two places and is the area from which the timber producing the logs removed as claimed by Company was cut by

Government, it was discovered that one or more of the monuments actually located on the ground by Hayden in 1896, did not lie upon the line of the 6th Standard Parallel South, as surveyed and established by Hathorn in 1855. Upon this discovery, the above-mentioned cadastral survey was ordered by the Acting State Director, Bureau of Land Management, to determine whether or not a hiatus existed between Tps. 27 and 28.

COMPANY'S CHAINS OF TITLE:

The parties, through counsel, have stipulated in writing filed in these proceedings that:

(a) Company is the owner of Secs. 31, 33 and that part of Sec. 35 involved, Tp. 27, by mesne conveyances, without restriction and no change in description, as originally patented to Pillsbury Lumber Co. September 20, 1923. The original patent (Exhibit A, parties' stipulation) from the Government to Pillsbury Lumber Co. conveys, with other parcels, " ... the southeast quarter of Sec. 31, the Sec. 33, ... the west half of the southwest quarter ... of Sec. 35 in Township twenty-seven south ..." in fee simple, subject only to vested and accrued water, mining, and other rights not involved in these proceedings.

(b) Company is the owner of Sec. 32, Tp. 27, by mesne conveyances, without restriction and no change in description, as originally patented to A. D. Hammond July 23, 1904. The original patent (Exhibit C, parties' stipulation) from the Government to A. D. Hammond conveys,

with other parcels, "... all of sections ... thirty-two in Township twenty-seven south ..." in fee simple, except reserving rights-of-way for ditches and canals not involved in these proceedings.

(c) Company is the owner of Sec. 34, Tp. 27, by mesne conveyances, without restriction and no change in description, as originally patented to A. D. Hammond July 31, 1903. The original patent (Exhibit D, parties' stipulation) from the Government to A. D. Hammond conveys, with other parcels, "... and all of section thirty-four, in Township twenty-seven south ..." in fee simple, except reserving rights-of-way for ditches and canals not involved in these proceedings.

While the description of the properties granted by each of the original patents does not specifically refer to any recorded plat, I take it to be the settled law, and most certainly the position of the Government, as recited in "Manual of Instructions for the Survey of Public Lands of the United States," 1930 Ed., Sec. 562, at p. 361:

> " ... a plat becomes a part of every government land patent that refers to any subdivisions whose descriptions are to be found upon such plat and that the legal significance of the plat in this respect is fully as important as though a copy of such plat had been incorporated into such patent."

At the time of the issuance of each of the three patents through which Company's title is derived, there was on file in the "Public Survey Office," or

the "Surveyor General's Office," at Salem and Portland, Oregon, the plat of Tp. 28 S, as surveyed and laid out by Dennis Hathorn in 1855, showing the 6th Standard Parallel South as the north boundary thereof (pretrial order Exhibit 6), and the plat of Tp. 27 S, as surveyed and laid out by William P. Hayden in 1896, showing the 6th Standard Parallel South as the south boundary thereof (pretrial order Exhibit 11), thereby showing as a matter of public record that the 6th Standard Parallel South, as surveyed and established on the ground by Hathorn in 1855, was the common east-west boundary between Tps. 27 and 28.

CONCLUSIONS

Based upon the pretrial order agreed facts, the documentary evidence, and the stipulation on Company's chains of title, I conclude that:

a) the true south boundary of Tp. 27 S, and particularly the south boundaries of Secs. 32, 33, 34, and 35 thereof, as delineated in the plat (pretrial order Exhibit 11) (Hayden's 1896 survey of Tp. 27 S), is the 6th Standard Parallel South, as surveyed, marked, and established on the ground by Hathorn in 1855;

b) the real property descriptions, as used in the respective original patents, conveyed from the Government to the respective patentees fee simple title in and to all of the land area in dispute, as delineated in Appendix 1. While the patents referred to total acreage, such reference to acreage has no limitations.[1]

c) Company is the owner in fee simple, with the reservations mentioned, of all of the land area in dispute, through mesne conveyances from the respective patentees; and

d) Government wrongfully removed and converted to its own use the logs, as claimed by Company, and it is entitled to recover from Government the value thereof in an amount not to exceed $5,000.00.

DISCUSSION

I completely disregard the 1961 cadastral survey so far as it purports to change or alter the course of the 6th Standard Parallel South as surveyed and established on the ground by Hathorn in 1855.

Of course, the Secretary of Interior's power, acting through the Chief Cadastral Engineer, Bureau of Land Management, 43 C.F.R. 9180.0-3(a), to make and correct surveys of public lands,

---

1/ Pretrial order Exhibits 6 and 11 (plats) show the land area involved to be very mountainous. Pretrial Exhibit 11 (plat of Tp. 27) indicates and delineates that Secs. 32, 33, 34 and 35 are each 80 chains or one mile square and contain 640 acres. The indicated acreage cannot be correct and controlling as to the acreage stated in the original patents. This court judicially notes that a section on a plain contains 640 acres, but in mountainous areas a section will contain more acreage, depending upon the height and sloping degree of the mountain crests.

is exclusive, and cannot be collaterally attacked. Cragin v. Powell, 128 U.S. 691 (1888). Recalling, however, the dates of the respective original patents involved, I point out that the Secretary has no power to change government-established parallel lines after the vesting of private rights, thereby divesting private owners of land previously sold or otherwise lawfully disposed of by the Government.

> " ... Nor is it denied that, when the Land Department has once made and approved a governmental survey of public lands, (the plats, maps, field notes and certificates all having been filed in the proper office,) and has sold or disposed of such lands, the courts have power to protect the private rights of the party who has purchased, in good faith, from the government against the interferences or appropriations of corrective resurveys made by that department subsequently to such disposition or sale." Cragin, supra, at pp. 699,700. See also Title 43 U.S.C.A. § 772.

Furthermore, the cadastral surveyor had no business following Hayden's monuments and corners in order to establish an intended hiatus of land areas between Tps. 27 and 28 S. If he thought that Hathorn's 1855 monuments and corners forming the south boundary of the disputed land area (Appendix 1) constituted an intolerable variance (from infinity at the termini to a maximum of approximately 150 feet, over a distance of approximately three miles) from a "due west line running east and west through R8 west ..." (Hathorn's instructions), he should have

re-established, or resurveyed, that portion of the 6th Standard Parallel South found to be erroneously established under the Hathorn survey by running his resurvey "due west" from the first discovered variance. This he would have done, I am sure, if he had been resurveying public lands not yet disposed of by the Government to private persons. In our case, the lands to the north and to the south of that portion of the 6th Standard Parallel South in which we are interested, had theretofore been disposed of by Government to private persons. One cannot escape from the conclusion that the Government, by the cadastral survey, is seeking to find public lands through an apparent error on the part of the two government surveyors.

There is and can be but one 6th Standard Parallel South, dividing Tp. 27 and Tp. 28 and forming the south boundaries of Secs. 32, 33, 34, and 35 in Tp. 27, and that is the 6th Standard Parallel South surveyed and established on the ground by Hathorn in 1855, as he was commissioned to do. I do not consider a variance from infinity to approximately 150 feet, over a distance of approximately three miles from a "due west" line, to be unreasonable or an intolerable variance under Hathorn's contract and instructions. Even if Hathorn's variance from a "due west" line be found to be intolerable, Government's discovery thereof comes too late, and Government cannot now impeach its own surveys after vesting of title in private persons on reliance thereof.

> "It has been held that the United States or a state is estopped by its grant of land to take advantage

of an error subsequently discovered in the survey under which the land was granted." 23 A.L.R. 2d, 1419, 1426, citing Lindsey v. Hawes, 2 Black 554, 17 L.Ed. 265 (1863); and St. Paul & Pacific Ry. v. Schurmeir, 7 Wall. 272, 19 L.Ed. 74 (1869).

It is manifestly clear that Hayden was not commissioned to establish or re-establish the 6th Standard Parallel South; his instructions were to "retrace" the 6th Standard Parallel South as surveyed and established on the ground by Hathorn in 1855 (pretrial Exhibit 7-A). Hayden could not find Hathorn's monuments and corners forming the south boundary of the land area in dispute (however, they were there, and were found in 1961), and, faced with this loss of corners and monuments, instead of proceeding "due west" in extension of the 6th Standard Parallel line he had been retracing, he varied to the north from infinity to a maximum of approximately 150 feet, over the distance of three miles. Hayden deviated from his instructions, and his corners and monuments cannot stand as the south boundaries of Secs. 32, 33, 34, and 35 in Tp. 27. The establishment of a hiatus between the boundaries of Tps. 27 and 28 through Hayden's retracing of the 6th Standard Parallel South, or his establishment of monuments and corners at variance with Hathorn's, cannot be read into his Contract 656 and his special instructions thereunder. In fact, such is in direct conflict with his instructions (pretrial order Exhibit 7-A).

The Government and the original patentees dealt with each other on the basis of the 6th Standard Parallel South, as established by Hathorn in 1855 (plats,

pretrial Exhibits 6 and 11), and Government must abide thereby today. 23 A.L.R. 2d 1419, 1426, supra.

In the pretrial order, the parties agreed that should it be determined that Company is the owner of the land area in dispute, which the court has so determined, that Company is entitled to damages for the value of the logs obtained by Government from the timber cut on Government's right-of-way of the access road, in the amount of $5,000.00.

This opinion shall stand as the court's findings of fact and conclusions of law, as provided by Rule 52 (a) F.R.Civ.P. Either party may submit additional findings and conclusions within 10 days from the date hereof.

Counsel for Company is requested to submit proposed judgment order in conformity herewith.

DATED April 8th, 1966.

APPENDIX B-1

Act of May 18, 1796, "An Act providing for the Sale of the Lands of the United States, in the territory northwest of the river Ohio, and above the mouth of Kentucky river." (ch. 29, § 2, 1 Stat. 465)

"Be it further enacted, That the part of the said lands, which has not been already conveyed by letters patent, or divided, in pursuance of an ordinance in Congress, passed on the twentieth of May, one thousand seven hundred and eighty-five, or which has not been heretofore, and during the present session of Congress may not be appropriated for satisfying military land bounties, and for other purposes, shall be divided by north and south lines run according to the true meridian, and by others crossing them at right angles, so as to form townships of six miles square, unless where the line of the late Indian purchase, or of tracts of land heretofore surveyed or patented, or the course of navigable rivers may render it impracticable; and then this rule shall be departed from no further than such particular circumstances may require. The corners of the townships shall be marked with progressive numbers from the beginning; each distance of a mile between the said corners shall be also distinctly marked with marks different from those of the corners. One half of the said townships, taking them alternately, shall be subdivided into sections, containing, as nearly as may be, six hundred and forty acres each, by running through the same, each way,

parallel lines, at the end of every two miles; and by marking a corner, on each of the said lines, at the end of every mile; the sections shall be numbered respectively, beginning with the number one, in the northeast section, and proceeding west and east alternately, through the township with progressive numbers, till the thirty-sixth be completed. And it shall be the duty of the deputy surveyors, respectively, to cause to be marked, on a tree near each corner made, as aforesaid, and within the section, the number of such section, and over it, the number of the township, within which such section may be; and the said deputies shall carefully note, in their respective field-books, the names of the corner trees marked, and the numbers so made: The fractional parts of townships shall be divided into sections, in manner aforesaid, and the fractions of sections shall be annexed to, and sold with, the adjacent entire sections. All lines shall be plainly marked upon trees, and measured with chains, containing two perches of sixteen feet and one half each, subdivided into twenty-five equal links, and the chain shall be adjusted to a standard to be kept for that purpose. Every surveyor shall note in his field-book the true situations of all mines, salt licks, salt springs and mill seats, which shall come to his knowledge; all water courses, over which the line he runs shall pass; and also the quality of the lands. These field-books shall be returned to the Surveyor General, who shall therefrom cause a description of the whole lands surveyed, to be made out and transmitted to the officers who

may superintend the sales: He shall also cause a fair plat to be made of the townships, and fractional parts of townships, contained in the said lands, describing the subdivisions thereof, and the marks of the corners. This plat shall be recorded in books to be kept for that purpose; a copy thereof shall be kept open at the Surveyor General's office, for public information; and other copies sent to the places of the sale, and to the Secretary of the Treasury."

APPENDIX B-2

Act of May 10, 1800, "An Act to amend the act intituled 'An act providing for the sale of the lands of the United States, in the territory northwest of the Ohio, and above the mouth of Kentucky river.'" (ch. 55, § 3, 2 Stat. 73)

"And be it further enacted, That the surveyor-general shall cause the townships west of the Muskingum, which by the above-mentioned act are directed to be sold in quarter townships, to be subdivided into half sections of three hundred and twenty acres each, as nearly as may be, by running parallel lines through the same from east to west, and from south to north, at the distance of one mile from each other, and marking corners, at the distance of each half mile on the lines running from east to west, and at the distance of each mile on those running from south to north, and making the marks, notes and descriptions, prescribed to surveyors by the above-mentioned act: And the interior lines of townships intersected by the Muskingum, and of all the townships lying east of that river, which have not been heretofore actually subdivided into sections, shall also be run and marked in the manner prescribed by the said act, for running and marking the interior lines of townships directed to be sold in sections of six hundred and forty acres each. And in all cases where the exterior lines of the townships, thus to be subdivided into sections or half sections, shall exceed or shall not extend six miles, the excess or deficiency shall be specially noted,

and added to or deducted from the western and northern ranges of sections or half sections in such township, according as the error may be in running the lines from east to west, or from south to north; the sections and half sections bounded on the northern and western lines of such townships shall be sold as containing only the quantity expressed in the returns and plats respectively, and all others as containing the complete legal quantity. And the President of the United States shall fix the compensation of the deputy surveyors, chain carriers, and axe-men: Provided, the whole expense of surveying and marking the lines, shall not exceed three dollars for every mile that shall be actually run, surveyed and marked."

APPENDIX B-3

Act of February 11, 1805, "An Act covering the mode of surveying the Public Lands of the United States." (ch. 14, §§ 1 & 2, 2 Stat. 313)

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the surveyor-general shall cause all those lands north of the river Ohio, which, by virtue of the act, intituled 'An act providing for the sale of the lands of the United States, in the territory northwest of the river Ohio, and above the mouth of the Kentucky river,' were subdivided, by running through the townships, parallel lines each way, at the end of every two miles, and by marking a corner on each of the said lines, at the end of every mile; to be subdivided into sections, by running straight lines from the mile corners thus marked, to the opposite corresponding corners, and by marking on each of the said lines, intermediate corners as nearly as possible equidistant from the corners of the sections on the same. And the said surveyor-general shall also cause the boundaries of all the half sections, which had been purchased previous to the first day of July last, and on which the surveying fees had been paid, according to law, by the purchaser, to be surveyed and marked, by running straight lines from the half-mile corners, heretofore marked, to the opposite corresponding corners; and intermediate corners shall, at the same time, be marked on each of the said dividing lines, as nearly as possible equidistant from the corners of the half section on

the same line: Provided, that the whole expense of surveying and marking the lines, shall not exceed three dollars for every mile which has not yet been surveyed, and which shall be actually run, surveyed, and marked by virtue of this section. And the expense of making the subdivisions, directed by this section, shall be defrayed out of the monies appropriated, or which may be hereafter appropriated, for completing the surveys of the public lands of the United States.

"Sec. 2. And be it further enacted, That the boundaries and contents of the several sections, half sections, and quarter sections of the public lands of the United States, shall be ascertained in conformity with the following principles, any act or acts to the contrary notwithstanding:

"1st. All the corners marked in the surveys, returned by the surveyor-general, or by the surveyor of the land south of the state of Tennessee, respectively, shall be established as the proper corners of sections, or subdivisions of sections, which they were intended to designate; and the corners of half and quarter sections, not marked on the said surveys, shall be placed as nearly as possible equidistant from those two corners which stand on the same line.

"2d. The boundary lines, actually run and marked in the surveys returned by the surveyor-general, or by the surveyor of the land south of the state of Tennessee, respectively, shall be

established as the proper boundary lines of the sections, or subdivisions, for which they were intended, and the length of such lines, as returned by either of the surveyors aforesaid, shall be held and considered as the true length thereof. And the boundary lines, which shall not have been actually run, and marked as aforesaid, shall be ascertained, by running straight lines from the established corners to the opposite corresponding corners; but in those portions of the fractional townships, where no such opposite corresponding corners have been or can be fixed, the said boundary lines shall be ascertained, by running from the established corners, due north and south, or east and west lines, as the case may be, to the water-course, Indian boundary line, or other external boundary of such fractional township.

"3d. Each section, or subdivision of section, the contents whereof shall have been, or by virtue of the first section of this act, shall be returned by the surveyor-general, or by the surveyor of the public lands south of the state of Tennessee, respectively, shall be held and considered as containing the exact quantity, expressed in such return or returns: and the half sections and quarter sections, the contents whereof shall not have been thus returned, shall be held and considered as containing the one half, or the one fourth part respectively, of the returned contents of the section of which they make part."

CERTIFICATE OF SERVICE

I, one of the attorneys for the petitioner Weyerhaeuser Company in the foregoing and annexed proceeding, being a member of the Bar of the Supreme Court of the United States, do hereby certify that, on the 21st day of June 1968, I served copies of the Petition for Writ of Certiorari by mailing three copies thereof in a duly addressed envelope, with airmail postage prepaid, to

The Honorable Erwin Griswold
Solicitor General of the
United States
Department of Justice
Washington, D.C. 20530

and that all parties required to be served have been served.

Snyder J. King

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No. 222

In the Supreme Court of the United States

OCTOBER TERM, 1968

WEYERHAEUSER COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CLYDE O. MARTZ,
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 392 F.2d 448.[1] The opinion of the district court (Pet. App. A, 1–14) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 26, 1967. A timely petition for rehearing was denied on February 28, 1968. Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to June 24, 1968, and the petition was filed

[1] The opinion below (C.A. Op.) is reproduced between the brief and Appendix A of the petition. Its pagination runs from 1 through 8, and is followed by the one-page appendix of the court of appeals consisting of a map showing the area in dispute.

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on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the actual markings, on the ground, of an official public lands survey controls the boundaries of the township it created.

STATUTE INVOLVED

43 U.S.C. 752[2] provides in pertinent part:

> The boundaries and contents of the several sections, half-sections, and quarter-sections of the public lands shall be ascertained in conformity with the following principles:
>
> First. All the corners marked in the surveys, returned by the Secretary of the Interior or such agency as he may designate, shall be established as the proper corners of sections, or subdivisions of sections, which they were intended to designate * * *.
>
> Second. The boundary lines, actually run and marked in the surveys returned by the Secretary of the Interior or such agency as he may designate, shall be established as the proper boundary lines of the sections, or subdivisions, for which they were intended, and the length of such lines as returned, shall be held and considered as the true length thereof. * * *
>
> Third. Each section or subdivision of section, the contents whereof have been returned by the Secretary of the Interior or such agency as he may designate, shall be held and considered as containing the exact quantity expressed in such return * * *.

[2] 43 U.S.C. 752 is an updated and revised version of Ch. 14, Sec. 2, of the Act of February 11, 1805 (2 Stat. 313) (see Pet. App. B-3, 2-3).

STATEMENT

Petitioner Weyerhaeuser Company brought suit against the United States for damages for the alleged conversion of timber during a road-building project on land in Western Oregon which it claimed it owned. The United States also asserted ownership of the land in question as its defense to the action.

Petitioner owned Sections 31 through 35 in Township 27 (T. 27 S., R. 8 W., hereinafter "T. 27"), which were situated immediately north of the disputed area and, it claimed, included the disputed area—a strip of land containing some 45.95 acres. Patents to these sections of public lands in T. 27 were first issued beginning in 1903, and petitioner obtained title through conveyances from various patentees. The United States claimed the disputed area as unpatented public lands not surveyed prior to 1961.

The facts as to surveys were that one Hathorn, in 1855, surveyed the adjoining Township 28 (T. 28 S., R. 8 W., hereinafter "T. 28"), using the 6th Standard Parallel South, as he established it, as the northern boundary of the township. Hathorn's survey work was officially accepted and approved in 1856. In 1896, one Heydon surveyed T. 27—the township immediately to the north. His instructions were to begin his survey by setting his own monuments for T. 27 along the Hathorn parallel, which was to be a common line between the two townships. In running his survey of T. 27, Heydon was unable to locate Hathorn's monuments for T. 28 for a distance of two and one-half to three miles in the middle of the six-mile stretch. Nevertheless, he continued to set his own monuments to establish the southern boundary of T. 27, from which he then subdivided

the township.[3] Heydon submitted a plat of his survey which, as the pretrial order states, showed that the southern boundary he established coincided approximately with the northern boundary of Section 1, Section 2, the west half of Section 5, and all of Section 6 of T. 28. (The area of dispute, where the township lines as surveyed failed to coincide, is approximately the northern boundary of Section 3, Section 4 and the east half of Section 5 of T. 28.) Heydon's survey of T. 27 was officially accepted and approved by the United States in 1897. By the official Heydon survey of T. 27, each of Sections 32 through 36 consists of 640 acres and Section 31 consists of 639.60 acres.

The discovery of two sets of monuments during a recent road-building project led to the making of a dependent resurvey in 1961 of the original portions of the Hathorn and Heydon surveys. The resurvey revealed the hiatus designated as T. 27½ S., R. 8 W. (see map in C.A. Op. App.). For a distance of two and one-half to three miles, Heydon's monuments were north of the line connecting the Hathorn monuments. The area of the hiatus was 45.95 acres and its widest point was approximately 300 feet. It was surveyed and subdivided, with these steps receiving official approval in 1962. The plat and diagram of the 1961 resurvey show the southern boundary of T. 27, as originally surveyed by Heydon, and the northern boundary of T. 28, as

[3] Heydon's corners (or monuments) were not "closing corners" (see Pet. 6–7, 11–13)—they were initial, not terminating corners. Had Heydon been able to find Hathorn's corners there would have been two sets of corners along the same line—"double corners"—the Hathorn corners to govern T. 28 and the Heydon corners to govern T. 27.

originally surveyed by Hathorn, as two separate lines for the distance of two and one-half to three miles.

The government has consistently maintained throughout this litigation that actual location, on the ground, of each set of monuments controlled the boundaries of the respective townships each survey created. The theoretical or ideal location of where the monuments should have been established is, in our view, of no consequence. The district court concluded otherwise and entered judgment against the United States. From that judgment, the United States appealed, and the Ninth Circuit reversed. That court concluded that the "one decisive issue" in the case—"whether or not the Government's patents to Weyerhaeuser's predecessors in title conveyed to them the land here in question, which lay outside the boundaries of the Heydon survey," should be answered in the negative (C.A. Op. 7).

ARGUMENT

The decision by the court of appeals is correct and is not in conflict with any decisions of any other courts. It is well supported by a long line of cases holding that what the surveyor in fact marks on the ground demarcates the boundaries of the land surveyed.[4] Moreover, the instant case is of narrow significance because of the special and unusual facts involved. Contrary to petitioner's suggestions (Pet. 6, 11), the decision below is not of general importance and will not result in an unsettling of land boundaries.

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[4] As stated somewhat differently by petitioner (Pet. 6), the established rule is that "the actual locations of the monuments control the areas surveyed by each respective surveyor * * *."

The land here claimed by Weyerhaeuser was never patented to its predecessors in title because the patents to sections in T. 27 were based upon the 1896 Heydon survey which established that township and did not include the land in dispute (see C.A. Op. 6). Such patents could not include more land than was actually and officially surveyed. The monuments set by the official survey control the boundaries of a township and are not subject to judicial correction. *Cragin* v. *Powell,* 128 U.S. 691, 696–700; *United States* v. *State Investment Co.,* 264 U.S. 206, 211–212; *Russell* v. *Maxwell Land Grant Co.,* 158 U.S. 253, 256; 1 Patton, *Land Titles,* Secs. 116, 149, pp. 288–296, 390–391 (2d ed., 1957). This is the approach plainly mandated by Congress in 43 U.S.C. 752 (*supra,* p. 2) and that statute's predecessors (see note 2, *supra*).

Whether Heydon's official public lands survey *correctly* established T. 27 is not a justiciable question. As this Court observed a century ago: "[G]reat confusion and litigation would ensue if the judicial tribunals, state and federal, were permitted to interfere and overthrow the public surveys on no other ground than an opinion that they could have the work in the field better done, and divisions more equitably made, than the department of public lands could do." *Haydel* v. *Dufresne,* 17 How. 23, 30 (1854). See *Phelps* v. *Pacific Gas & Electric Co.,* 84 Cal. App. 2d 243, 190 P. 2d 209, 212; *Stonewall Phosphate Co.* v. *Peyton,* 39 Fla. 726, 23 So. 440, 441; 4 Tiffany, *Real Property,* Sec. 994, pp. 96–100 (3d ed. 1939); 6 Thompson, *Real Property,* Secs. 3041, 3058, pp. 558–562, 648–653 (1962 ed.). Moreover, as the court below pointed out,

"There is no problem in this case of impairment of vested rights" (C.A. Op. 7).[5]

CONCLUSION

For the reasons given, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1968.

[5] This is so because, as the court stated: "When the Government in 1896 employed Heydon to survey Township 27, no one except the Government had any rights in the area, all of which was owned by the Government. There being no rights in other persons in 1896, no rights were impaired by what the Government did with or upon its own land" (C.A. Op. 7).

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NO. 222

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

WEYERHAEUSER COMPANY

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

ARGUMENT

There are two primary arguments first raised by the government's brief in opposition, requiring this reply. They are inconsistent with one another, and each is inconsistent with the positions taken by the government in the courts below.

First, the government asserts that the instant case is of narrow significance

because of some unidentified special and unusual facts (Br 5). The only fact that arguably might be called special or unusual, mentioned by the government in the courts below, is that the notes of the second surveyor, Heydon, report that he was unable to find some of the 41-year-old monuments of the first surveyor, Hathorn (R-76).

Second, the government asserts that, even if Heydon had been able to find Hathorn's corners, "there would have been two sets of corners along the same line--'double corners'--the Hathorn corners to govern T. 28 and the Heydon corners to govern T. 27." (Br 4, footnote 3, second sentence.)

This second argument is inconsistent with the first, in that it wipes out the only "special and unusual facts" that can be found in the case. It squarely raises the principal issue in the case,

which is whether invariably the "actual location, on the ground, of each set of monuments controlled the boundaries of the respective townships each survey created." (Br.5.)

If so, there is no closing corner rule and it is futile to argue about whether that rule is limited to terminating, as distinguished from initial, corners. (Br.4, footnote 3, first sentence.)

The government's first, or "special facts" argument is consistent with the position it maintained during most of the proceedings below, but inconsistent with the position finally taken by the government in its reply brief in the Court of Appeals, where it is stated:

> "As in other instances in the public land surveys, the monument by the applicable surveyor controls over any theoretical joinder of lines." (R. Vol. I, Rep. Br., p. 8) (Emphasis ours.)

The government's second, or "invariable actual location" argument, is inconsistent

not only with the first, but also with its position during most of the proceedings in both of the courts below.

In the government's answer brief submitted to the trial court, the government argued:

> "Had Heydon recovered the Hathorn line and corners and established his initial points for subdividing township 27 south, range 8 west, exactly on line between them, no problem would exist. Had he recovered the Hathorn corners and deviated slightly from line in establishing his own corners, the problem would be a minor one which in similar cases has been taken care of by directly connecting the corners or by offsetting the junior corners onto the senior line." (R. 123) (Unless otherwise designated, references are to Vol. II of the record.)

In its opening brief on appeal to the Court of Appeals, the government argued:

> "Where, on paper, there should have been a common boundary between the two townships, there is an area, T. 27-1/2 S., R. 8 W., which neither surveyor in fact surveyed--omitted land. This, admittedly, resulted from Heydon's inability to locate Hathorn's monuments for a distance of about three miles." (R. Vol. I, opening brief, p. 23.) (Emphasis ours.)

The government's reply brief on appeal states:

> "The field notes show that, when Heydon could not find Hathorn's corners for about three miles, he set his own (R. 76; Ex. 10). . . . The hiatus is where Heydon's line fails to coincide with Hathorn's line of Sections 3, 4 and half of 5 of Township 28, leaving a gap between the two lines." (R. Vol. I, reply brief, pp. 3, 4.)

These changes in position and inconsistencies are the inevitable result of the government's effort to sustain an untenable position. They also resulted in a rather glaring error by the Court of Appeals. The initial opinion of that court ruled against the petitioner as to an area only two and a half miles long. This might be justified by the special and unusual circumstances of the second surveyor's failure to find several monuments of the first surveyor. When it was pointed out on petition for rehearing (R. Vol. I, Pet. for Rehearing, pp. 1, 2) that this was not the entire area claimed

by the government, the opinion was modified to deny the petitioner's claim to any portion of the "area here in question and shown by the map attached hereto as Appendix 1." (C.A. Op. 4.) However, it still describes only a two and one-half mile strip (C.A. Op. 3) and does not give any reason for stretching its ruling to cover an additional one-half mile strip.

This obvious technical flaw in the opinion below focuses attention on the inconsistent positions of the government. More importantly, it strongly suggests that there is no rational basis for either position. Like Harriet Beecher Stowe's Eliza crossing the ice, if the government stands in one position it is either caught by pursuing arguments or sinks under the weight of its own excessive claim. Thus, in its brief in opposition, the government not only adopts inconsistent legal positions, but also seeks to sidestep the

factual discrepancy of more than one-half mile.

To demonstrate, the government brief indicates that the second surveyor failed to locate the first surveyor's old monuments for a distance of "two and one-half to three miles." (Br. 3.) It then describes the area in dispute as "approximately the northern boundary of Section 3, Section 4 and the east half of Section 5 of T. 28." (Br. 4), which is not the entire area in dispute. It states that "For a distance of two and one-half to three miles, Heydon's monuments were north of the line connecting the Hathorn monuments." (Br. 4.) Finally, it states that the plat and diagram of the 1961 resurvey show the respective boundaries of the earlier surveys as two separate lines "for the distance of two and one-half to three miles." (Br. 5.) In actual fact, even a cursory glance at any

of the diagrams of the area in dispute (C.A. Op., App. 1; R. 96; Ex. 1, 14, admitted R. 84) shows that the area is over three miles long. The trouble is that the "special and unusual facts" will not sustain an area more than two and one-half miles long, and the "invariable actual location rule" has some obvious and long-recognized exceptions that the government does not care to discuss.

In essence, the government has opened Pandora's box by taking a position in a double corner case based upon legal authorities applicable only to single corner cases. It has released a cloud of uncertainties that it simply cannot explain away. It now finds itself on the horns of both legal and factual dilemmas. It seeks to avoid further embarrassment, and to preserve a windfall, by foreclosing a review on the merits of the opinion of the Court of Appeals.

Specifically, it urges that this honorable Court refuse to review the decision below because it is:

(a) correct, and not in conflict with any decisions of any other courts,

(b) well-supported by a long line of cases,

(c) of narrow significance because of the special and unusual facts involved, and

(d) not of general importance and not unsettling of land boundaries.

As to point (a), the decision is not correct for the reasons and on the authorities cited (i) in petitioner's numerous briefs in the courts below, (ii) in the trial court opinion, (iii) in the Petition for Rehearing in the Court of Appeals, (iv) in the Petition for Certiorari, and (v) elsewhere in this reply brief. As to "conflict" with other decisions, the petition does not assert conflict as a grounds

for review, but rather that the opinion below passes upon an important federal question not heretofore considered by this honorable Court, or squarely decided in other reported decisions.

As to point (b), the long line of cases clearly are not applicable to double corner situations. The citation to the text of Patton on Land Titles is merely repetition of the same inapplicable rule. Moreover, the government fails to heed that author's admonition that boundary and survey law is a separate subject from land titles, and that in order to understand land descriptions a lawyer should first bone up on the latter subject by reading texts such as Clark on Surveying and Boundaries. (1 Patton, Land Titles, § 52 at footnote 46, p. 202 (2nd ed.), 1957.) Furthermore, if the "long line of cases" are applicable to double corner situations, then all references to closing corners

in the judicial decisions, treatises, and in the government's own highly regarded Manual of Instructions for the Survey of the Public Lands of the United States (first published in 1855) are clearly in error.

As to points (c) and (d), the government has abandoned its prior contention on special or unusual facts (probably because it cannot sustain the full scope of the decision below on any such facts).

The government asserts, in footnote 3 on page 4 of its brief in opposition, that its position applies to all double corner situations, fairly common along the nearly two million miles of township boundaries in the United States. Thus the case obviously is of general importance and will be of extremely broad significance. It will allow the government to "find" accidental gaps in double corner situations and establish ownership

of gores, strips or slivers where no one, including the abutting owners, has dreamed that such nuisance ownerships exist.

CONCLUSION

The trial court was correct. It found "particular and controlling interest" in the exhibit attached to the second surveyor's instructions, showing the south boundary of Township 27 to have been already surveyed (R. 87, 88, Pet. App. A, trial court opinion, p. 5). It emphasized that the second surveyor's instructions were to retrace the 6th Standard Parallel South as established by the senior surveyor (R. 87, 94, Pet. App. A, trial court opinion, pp. 5, 13). It noted that the official plat of the survey of Township 27 shows the 6th Standard Parallel as established by the first or senior surveyor as the south boundary of that township (R. 88, 89, Pet. App. A, trial court opinion, p. 6). Thus, in essence, it held that the

second surveyor's monuments were closing corners. It applied the closing corner rule by stating that there is and can be but one 6th Standard Parallel South dividing Townships 27 and 28, which was established by the senior surveyor (r. 93, 94, Pet. App. A., trial court opinion, p. 12), and by stating that the junior surveyor's monuments cannot stand as controlling the south boundary of Township 27 (R. 94, 95, Pet. App. A., trial court opinion, p. 13).

The Court of Appeals decision is not correct. Even though it does not mention the closing corner rule, it would abolish that rule (a) by stating that two Standard Parallels can in fact exist in nearly the same location (R. Vol. II, C.A. Op. 6, 7) and (b) by failing to recognize the distinction between retracing and establishing a Standard Parallel (or other township exterior) as noted by the

trial court. It decides against the petitioner (but only the concurring opinion expressly rules that the government owns the strip in dispute), apparently because it disagrees with some remarks in the trial court opinion. In seeking to apply the wisdom of centuries of land law, it totally disregards that part of the ancient lore applicable to closing corners. It confuses monuments with boundaries. As a result, it "perceives" as "the decisive issue" (C.A. Op. 7) that petitioner is laying claim to land "outside the boundaries of Heydon's survey" of Township 27. The disputed area lies outside the monuments of the Heydon survey, but the true decisive issue is whether it lies within the boundaries of Township 27.

The Petition for Certiorari should be granted, and the decision of the Court of Appeals should be reviewed

on the merits. The relationship between the actual location rule and the closing corner (or double corner) rule should be recognized and clarified by this honorable Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, one of the attorneys for the petitioner Weyerhaeuser Company in the foregoing and annexed proceeding, being a member of the Bar of the Supreme Court of the United States, do hereby certify that, on the 12th day of August, 1968, I served copies of the Reply to Brief in Opposition by mailing three copies thereof in a duly addressed envelope, with airmail postage prepaid, to

The Honorable Erwin Griswold
Solicitor General of the
United States
Department of Justice
Washington, D.C. 20530

and that all parties required to be served have been served.

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